

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ANTHONY D. JONES,

Plaintiff,

V.

TACOMA POLICE DEPARTMENT,  
KENNETH P. SMITH, HENRY BETTS,

## Defendants.

No. C12-6065 RJB-KLS

## **REPORT AND RECOMMENDATION**

**Noted for: January 3, 2014**

Before the Court is the motion for summary judgment of Defendants Tacoma Police Department (TPD), Kenneth P. Smith, and Henry Betts. ECF No. 25. On October 28, 2013, Defendants provided Plaintiff Anthony D. Jones with a notice consistent with *Woods v. Carey*, 684 F.3d 934, 935, 940-41 (9<sup>th</sup> Cir. 2012). Mr. Jones filed no papers in opposition to the motion.

Based on the Court's review of the motion, summary judgment evidence, and balance of the record, the Court concludes that Defendants' motion for summary judgment should be granted.

## FACTS AND PROCEDURAL HISTORY

## A. Facts

On November 21, 2007, Tacoma Police Officers Kenneth Smith and Henry Betts were on duty when they saw Mr. Jones driving an automobile without wearing a seat belt. ECF No. 26,

1 Affidavit of Jean P. Homan and Exhibit 1 (Excerpts from Volume I of Report of Proceedings  
 2 before the Pierce County Superior Court, Cause 08-1-00445-9) (hereinafter RP 1), pp. 105-108;  
 3 see also Exhibit 9 to Homan Affidavit (copy of partially published opinion in *State v. Anthony*  
 4 *DeWayne Jones*, 163 Wn. App. 354; 266 P.3d 822 (August 30, 2011)). Officer Smith initiated a  
 5 traffic stop. RP I, p. 109. As Officer Smith approached, Mr. Jones opened the door to his  
 6 automobile. RP I, pp. 110-111.

7                   Officer Smith observed a compartment in the open driver's side door of Mr. Jones's  
 8 automobile which contained white pills and an unlabeled pill bottle. RP I, pp. 112. The pills had  
 9 spilled out of one of the bottles and Officer Smith noted an imprint of the number 512 on one of  
 10 the white pills. RP I, pp. 112-113. Officer Smith recognized the pill as oxycodone. *Id.* Officer  
 11 Smith asked Mr. Jones who owned the pills and Mr. Jones responded that they belonged to his  
 12 wife. RP I, pp. 113-114. Officer Smith asked Mr. Jones if the pill bottle was labeled and Mr.  
 13 Jones responded that it was not. *Id.* Officer Smith asked Mr. Jones what the pills were and Mr.  
 14 Jones told Officer Smith that the pills were Percocet<sup>1</sup>. *Id.* Officer Smith advised Mr. Jones he  
 15 was under arrest for unlawful possession of a controlled substance, asked him to step out of his  
 16 automobile, placed him in handcuffs, and read him his *Miranda*<sup>2</sup> warnings. RP I, p. 115.

17                   Officer Smith then searched Mr. Jones incident to arrest. RP I, p. 118. As he reached  
 18 into Mr. Jones's left front pant pocket, Mr. Jones said, "This is not good; I am f\*\*\*ed." RP I, p.  
 19 119. Concerned for his safety, Officer Smith asked Mr. Jones what was in his pocket. *Id.* Mr.  
 20 Jones replied, "I got some stuff that I should not be having." PR I, p. 120. Officer Smith then  
 21 opened Mr. Jones's pocket to look inside and observed a plastic baggie containing individually  
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<sup>1</sup> Percocet contains oxycodone and acetaminophen. PHYSICIAN'S DESK REFERENCE 1125 (62d ed. 2008).

24                   <sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

1 packaged blue baggies. Each baggie contained a white chalky substance. *Id.* Officer Smith  
2 asked Mr. Jones if the substance, which he suspected to be crack cocaine, was fake and Mr.  
3 Jones replied, “No, that’s some coke.” RP I, pp. 121-122. At trial, Officer Smith testified that in  
4 his experience, the amount of cocaine, a total of 21 grams, and the packaging were consistent  
5 with an intent to sell the drugs. When Officer Smith asked Mr. Jones what he intended to do  
6 with the drugs, Mr. Jones responded that he had intended to sell the pills and the crack cocaine.  
7 RP I, p. 129-131.

8 After placing Mr. Jones in the back of his patrol car, Officer Smith searched Mr. Jones’s  
9 automobile. Officer Smith found two pill containers, which contained pills, in the driver’s side  
10 door console. The large pill bottle contained what appeared to be oxycodone and methadone  
11 pills. The smaller bottle contained what appeared to be methadone pills. RP I, p. 122, 125-127.  
12 Forensics later confirmed that the substances found in Mr. Jones’s automobile and on his person  
13 were cocaine, oxycodone, and methadone. *State v. Jones*, 266 P.3d at 889.

14 Mr. Jones’ version of the events corroborates the officers’ testimony. ECF No. 26,  
15 Exhibit 2 to Homan Affidavit (excerpts from Volume II of the Proceedings), herein RP II, pp.  
16 236-245. Officer Betts testified similarly to Officer Smith, however, Officer Betts did not  
17 conduct the search of Mr. Jones’s person or his automobile. RP I, pp. 165-171.

18 On January 25, 2008, Mr. Jones was charged with unlawful possession of cocaine with  
19 intent to deliver, unlawful possession of oxycodone, and unlawful possession of methadone in  
20 the Pierce County Superior Court. ECF No. 26, Exhibit 3 to Homan Affidavit (original  
21 Information and Affidavit of Probable Cause). During trial, the State amended the information,  
22 adding a school bus zone enhancement to Mr. Jones’s unlawful possession of cocaine with intent  
23 to deliver charge. *Id.*, Exhibit 4 to Homan Affidavit (Amended Information and Affidavit for  
24

1 Probable Cause). Mr. Jones was found guilty at a jury trial on all three counts, including the  
 2 school bus zone enhancement. *Id.*, Exhibit 5 to Homan Affidavit (original Judgment and  
 3 Sentence). Mr. Jones was sentenced to 60+ months on the possession of cocaine with intent to  
 4 deliver charge, plus an additional twenty-four months consecutive school bus zone enhancement.  
 5 *Id.* Mr. Jones was also sentenced to 24 months' incarceration for the possession of the  
 6 oxycodone and methadone pills located in his automobile. Those sentences were ordered to run  
 7 concurrently with his 84 month sentence for the unlawful possession of cocaine with intent to  
 8 deliver (within 1,000 feet of a school bus zone).

10 **B. Procedural History**

11 Mr. Jones successfully appealed his conviction for unlawful possession of oxycodone and  
 12 unlawful possession of methadone under the Washington Constitution on the grounds that  
 13 Officer Smith's search of Mr. Jones's automobile was illegal because Officer Smith did not  
 14 obtain a warrant prior to conducting the search. The Court of Appeals determined that although,  
 15 under the open view doctrine, the officer's observation of the pills, from the non-constitutionally  
 16 protected area outside of the automobile, was not a search, entry into the automobile violated  
 17 article I, §7 of the Washington State Constitution.<sup>3</sup> *State v. Jones*, 163 Wn. App. 354, 266 P.3d  
 18 886 (2011).

20 The Washington Court of Appeals reversed Mr. Jones's convictions for possession of the  
 21 oxycodone and methadone pills but affirmed his conviction for unlawful possession of cocaine  
 22 with intent to deliver within 1,000 feet of a school bus zone. *Jones*, 163 Wn. App. at 356. Mr.  
 23 Jones was resentenced by the Pierce County Superior Court on the remaining affirmed charge.

25  
 26 <sup>3</sup> Although the automobile exception is recognized for purposes of the Fourth Amendment of the United States  
 Constitution, it is not recognized under article I, §7 of the Washington State Constitution. *State v. Snapp*, 174  
 Wn.2d 177, 192, 275 P.3d 289 (2012).

1 ECF No. 26, Exhibit 6 to Homan Affidavit (Order of Dismissal re: Counts II and III) and Exhibit  
2 7 (Judgment and Sentence, Count I) to Homan Affidavit. Mr. Jones's judgment and sentence on  
3 Count I has been affirmed by the Court of Appeals. *Id.*, Exhibit 8 to Homan Affidavit.

4 Mr. Jones brought this 42 U.S.C. §1983 action alleging that the warrantless search of his  
5 automobile after his arrest violated his federal constitutional rights. Defendants argue that the  
6 search of Mr. Jones's automobile incident to arrest and the seizure of drugs in plain sight did not  
7 violate his federal constitutional rights. They also argue that Mr. Jones cannot establish the  
8 essential elements of his municipal liability claim and that Officers Smith and Betts are entitled  
9 to qualified immunity.

10

### **SUMMARY JUDGMENT STANDARD**

11 The Court shall grant summary judgment if the movant shows that there is no genuine  
12 dispute as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R.  
13 Civ. P. 56(a). The moving party has the initial burden of production to demonstrate the absence  
14 of any genuine issue of material fact. Fed. R. Civ. P. 56(a); *see Devereaux v. Abbey*, 263 F.3d  
15 1070, 1076 (9<sup>th</sup> Cir. 2001) (en banc). To carry this burden, the moving party need not introduce  
16 any affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the  
17 absence of evidence to support the nonmoving party's case. *Fairbank v. Wunderman Cato*  
18 *Johnson*, 212 F.3d 528, 532 (9th Cir.2000). A nonmoving party's failure to comply with local  
19 rules in opposing a motion for summary judgment does not relieve the moving party of its  
20 affirmative duty to demonstrate entitlement to judgment as a matter of law. *Martinez v.*  
21 *Stanford*, 323 F.3d 1178, 1182-83 (9th Cir. 2003).

22 “If the moving party shows the absence of a genuine issue of material fact, the non-  
23 moving party must go beyond the pleadings and ‘set forth specific facts’ that show a genuine

1 issue for trial.” *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002) (*citing Celotex*  
2 *Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)). The non-  
3 moving party may not rely upon mere allegations or denials in the pleadings but must set forth  
4 specific facts showing that there exists a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*,  
5 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). A plaintiff must “produce at least  
6 some significant probative evidence tending to support” the allegations in the complaint. *Smolen*  
7 *v. Deloitte, Haskins & Sells*, 921 F.2d 959, 963 (9th Cir. 1990). A court “need not examine the  
8 entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in  
9 the opposing papers with adequate references so that it could conveniently be found.”  
10 *Automobilemen v. San Francisco Unified School District*, 237 F.3d 1026, 1031 (9th Cir. 2001).  
11 This is true even when a party appears *pro se*. *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir.  
12 2007).  
13

## 15 DISCUSSION

16 In order to sustain a cause of action under 42 U.S.C. § 1983, a plaintiff must show (i) that  
17 he suffered a violation of rights protected by the Constitution or created by federal statute, and  
18 (ii) that the violation was proximately caused by a person acting under color of state law.  
19 *Crumption v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To satisfy the second prong, plaintiff  
20 must allege facts showing how individually named defendants caused or personally participated  
21 in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir.  
22 1981). The causation requirement of § 1983 is satisfied only if a plaintiff demonstrates that a  
23 defendant did an affirmative act, participated in another’s affirmative act, or omitted to perform  
24 an act which he was legally required to do that caused the deprivation complained of. *Id.*  
25 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)).

1           **A.     Fourth Amendment – Warrantless Search of Mr. Jones’s Automobile**

2           Mr. Jones alleges that his automobile was illegally searched after he had been arrested,  
 3 handcuffed, and placed in the patrol car. He alleges that his automobile was in a parking lot and  
 4 that there was nothing to prevent the officers from safely securing the scene and obtaining a  
 5 warrant before they searched it. ECF No. 12. Mr. Jones makes no claims in this case relating to  
 6 the initial traffic stop (failure to wear a seat belt in violation of RCW 46.61.688), his arrest for  
 7 the unlawful possession of a controlled substance (Percocet), or the search of his person incident  
 8 to his arrest (which revealed 21 grams of crack cocaine in individual baggies). The only claim  
 9 before this Court is whether the warrantless search of Mr. Jones’s automobile (which revealed  
 10 two pill bottles containing oxycodone and methadone pills) violated his Fourth Amendment right  
 11 against unreasonable searches and seizures.<sup>4</sup>

12           Generally, “searches conducted outside the judicial process, without prior approval by  
 13 judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few  
 14 specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347,  
 15 357 (1967). Under federal law, one such exception is the “automobile” exception. In November  
 16 2007, when Officer Smith conducted the search of Mr. Jones’s automobile, it had been long  
 17 established by the United States Supreme Court that “when a policeman has made a lawful  
 18 custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that  
 19 arrest, search the passenger compartment of that automobile. It follows from this conclusion that

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 23           <sup>4</sup> To the extent Mr. Jones contends that the search of his automobile was a violation of the Washington State  
 24 Constitution, his claim is not cognizable in this Section 1983 action. It is well established that in Washington a  
 25 plaintiff cannot maintain an action for damages based on constitutional violations, unless a statute so allows. *Blinka*  
 26 *v. Washington State Bar Association*, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001). See also *Reid v. Pierce County*,  
 136 Wn.2d 195, 213, 961 P.2d 333 (1998) (Washington Supreme Court declined to create civil cause of action for  
 damages for an alleged violation of article I, §7 of the Washington State Constitution).

1 the police may also examine the contents of any containers found within the passenger  
2 compartment, for if the passenger compartment is within reach of the arrestee, so also will  
3 containers in it be within his reach.” *New York v. Belton*, 453 U.S. 454, 460 (1981); *Thornton v.*  
4 *United States*, 541 U.S. 615 (2004); see also *California v. Carney*, 471 U.S. 386 (1985)  
5 (automobile exception justified based on lower expectation of privacy in an automobile); *Carroll*  
6 *v. United States*, 267 U.S. 132, 153-54 (1925) (warrantless automobile search supported by  
7 probable cause of a crime is lawful due to the mobility inherent in an automobile).

9 Therefore, at the time of Officer Smith’s search of Mr. Jones’s automobile in November  
10 2007, the search was recognized as an exception to the Fourth Amendment’s warrant  
11 requirement and there was no constitutional deprivation. About two years after Mr. Jones’s  
12 conviction, the Supreme Court redefined the contours of the automobile exception in *Arizona v.*  
13 *Gant*, 556 U.S. 332 (2009). Gant was arrested for driving with a suspended license and was  
14 handcuffed in the back of a patrol car when a search of his automobile revealed cocaine in the  
15 pocket of a jacket on the backseat. 556 U.S. at 335. The police suspected that Gant was engaged  
16 in selling drugs because of a tip relating to the residence Gant was visiting. *Id.* When the police  
17 observed Gant drive up to the residence, they arrested him for driving with a suspended license.  
18 *Id.* The Supreme Court held that the search was unreasonable because the drug evidence  
19 searched for and recovered in the automobile was unrelated to the crime for which Gant was  
20 arrested, i.e., driving with a suspended license. *Id.* at 343. The court recognized, however, that  
21 in certain cases “the offense of arrest will supply a basis for searching the passenger  
22 compartment of an arrestee’s automobile and any containers therein.” *Id.*

25 Thus, police may now search an automobile incident to a recent occupant’s arrest only if  
26 the arrestee is within reaching distance of the passenger compartment at the time of the search, or

1 it is reasonable to believe the automobile contains evidence of the *offense of arrest*. *Gant*, 556  
2 U.S. at 351 (emphasis added). When these justifications are absent, a search of an arrestee's  
3 automobile will be unreasonable unless police obtain a warrant or show that another exception to  
4 the warrant requirement applies. *Id.*

5 Even post-*Gant*, the warrantless search of Mr. Jones's automobile was legal because  
6 under the search of automobile incident to arrest exception, the record reflects that Officer Smith  
7 reasonably believed that evidence relevant to the crime of the arrest might be found in Mr. Jones'  
8 automobile. See *Gant*, 556 U.S at 343. Unlike *Gant* who was arrested for a traffic offense, Mr.  
9 Jones was arrested for unlawful possession of a controlled substance. Officer Smith had already  
10 clearly observed the drugs in the automobile, from his vantage point outside the automobile, and  
11 his observations together with Mr. Jones's pre-arrest admissions formed the basis for the arrest  
12 for possession of a controlled substance. Thus, it was reasonable for Officer Smith to believe  
13 that a search of the driver's side door would lead to evidence relevant to the crime of arrest.  
14

15 Based on the foregoing, the undersigned recommends that Defendants' motion for  
16 summary judgment on Mr. Jones's Fourth Amendment claim be granted. At the time of Officer  
17 Smith's search of Mr. Jones's automobile, the search was a legitimate search incident to arrest.  
18 Even post-*Gant*, the search does not violate the Fourth Amendment as it was reasonable for  
19 Officer Smith to believe that he would find evidence relating to the offense for which Mr. Jones  
20 had been arrested. Moreover, the search was valid under the plain view doctrine.  
21

22 **C. Municipal Liability – City of Tacoma**

23 Defendant City of Tacoma is entitled to summary judgment on Mr. Jones's claims under  
24 § 1983 because there is no genuine issue of material fact that Mr. Jones's injury was not inflicted  
25 pursuant to city policy, regulation, custom or usage. "A municipality may be held liable under a  
26

1 claim brought under § 1983 only when the municipality inflicts an injury, and it may not be held  
 2 liable under a respondeat superior theory.” *Gibson v. County of Washoe*, 290 F.3d 1175, 1185  
 3 (9th Cir.2002) (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694  
 4 (1978)). Plaintiffs who seek to impose liability on local governments under § 1983 must prove  
 5 that “action pursuant to official municipal policy” caused their injury. *Monell*, 436 U.S. at 691,  
 6 98 S.Ct. 2018. “Official municipal policy includes the decisions of a government’s lawmakers,  
 7 the acts of its policymaking officials, and practices so persistent and widespread as to practically  
 8 have the force of law.” *Connick v. Thompson*, — U.S. —, 131 S.Ct. 1350, 1359, 179  
 9 L.Ed.2d 417 (2011).

11 Mr. Jones names the City of Tacoma in his complaint but asserts no factual allegations  
 12 against the City. There is also nothing in the record to support a conclusion that municipal  
 13 policy caused the alleged constitutional violation. See *Watkins v. City of Oakland*, 145 F.3d  
 14 1087, 1092 (9th Cir.1998). There is no evidence of practices of sufficient duration, frequency  
 15 and consistency that would represent a municipal custom or practice sufficient to trigger  
 16 municipal liability. See *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.1996).

18 Mr. Jones has presented no competent and admissible evidence to establish that a  
 19 violation of his constitutional rights occurred and that such violation was caused by a policy or  
 20 custom properly attributable to the City of Tacoma. Therefore, the undersigned recommends  
 21 that his municipal liability claim be dismissed.

22 **D. Qualified Immunity**

24 Defendants also argue that they are entitled to qualified immunity. ECF No. 25, pp. 18-  
 25 20. Under the doctrine of qualified immunity, prison officials are “shielded from liability for  
 26 civil damages insofar as their conduct does not violate clearly established statutory or

1 constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*,  
 2 457 U.S. 800, 818 (1982). A civil rights plaintiff opposing a claim of qualified immunity must  
 3 establish the existence of a constitutional violation, clearly established law to support the claim,  
 4 and that no reasonable official could believe their conduct was lawful. *Pearson v. Callahan*, 555  
 5 U.S. 223 (2009); *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Siegert v. Gilley*, 500 U.S. 226, 232  
 6 (1991).

7 As the Court has concluded that Mr. Jones has failed to raise material issues of fact  
 8 relating to his constitutional claims, it is not necessary to address the question of qualified  
 9 immunity.

10 **CONCLUSION**

11 Based on the foregoing, the undersigned recommends that Defendants' Motion for  
 12 Summary Judgment (ECF No. 25) be **GRANTED**, and Plaintiff's claims against Defendants be  
 13 **dismissed with prejudice**.

14 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
 15 Procedure, the parties shall have fourteen (14) days from service of this Report to file written  
 16 objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
 17 objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the  
 18 time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on  
 19 **January 3, 2014**, as noted in the caption.

20 **DATED** this 11th day of December, 2013.

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 Karen L. Strombom  
 United States Magistrate Judge